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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 662

AERO CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, AERO CORPORATION, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on June 15, 1966.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix "A", *infra*, pp. A1) is not yet reported. The findings of fact, conclusions of law and Order of the Board (R 227-403)[1a] are reported at 149 NLRB 1283.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1966 (Appendix "A", *infra*, p.A12). On September 12, 1966, by Order of this Court, the Petitioner was granted a thirty day extension of time to October 13, 1966, for the filing of this Petition. The jurisdiction of this Court is invoked under 28 USC 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 USC 160(e).

QUESTIONS PRESENTED

(1) Whether privileged communications of an Employer with employees under protection of Section 8(c) of the Act may be a substantial basis for findings of fact and of witness credibility where such findings are used as a basis for concluding Sections 8(a)(1), (3) and (5) of the Act have been violated.

(2) Whether the six month period of limitations provided in Section 10(b) of the National Labor Relations Act, as amended, bars the finding of a refusal to bargain violation under Section 8(a)(5) where the refusal to bargain allegation is grounded upon events occurring more than six months before the filing and service of the charge.

1a. "R" refers to the Joint Appendix to the parties' briefs filed in the Court of Appeals containing stipulated portions of the record and proceedings before this Court and before the National Labor Relations Board which has been certified by the Clerk of that Court and lodged with this Court.

(3) Whether, if the Section 10(b) period of limitations is fatal to a refusal to bargain finding, an affirmative bargaining order is a permissible remedy for violation of Sections 8(a)(1) and (3) of the Act and further, whether such an order is permissible where a question of the Union's current *de facto* majority status may exist.

(4)(a) Whether a Union authorization card's language stating it is not an application for membership and its purpose in the alternative is for an election is ambiguous and equivocal and therefore an invalid designation of the Union as the signer's collective bargaining representative.

(b) Whether the misrepresentations made to signers of Union cards that they were under no obligation to the Union; that the cards were part of a survey to determine employee interest in the Union; and that the cards were to get an election and there would be an election, taken in context with the card's language that it is not a membership application and is for use in support of demand for recognition or for an NLRB election, renders the cards of such signers invalid.

(c) Where a Union authorization card states it is not an application for membership and provides in the alternative that the card may be used either for an election or in support of recognition, does such language establish the right at a Board hearing to question witnesses as to which purpose such card was executed.

(5) Whether the activities of supervisors in obtaining, distributing, soliciting and collecting Union authorization cards interfered in employee organizing rights guaranteed under Section 7 of the Act and thereby voided all or a part of the Union's authorization cards.

(6) Where the General Counsel has sworn affidavits in his possession bearing upon the execution of Union au-

thorization cards and the fact of valid execution of these cards is to be decided not by the witness' own testimony, but by handwriting analysis, may the General Counsel on demand refuse to allow examination of such statements at the hearing.

As a part of the above questions, the Petitioner also contends that substantial evidence considered on the record as a whole fails to support the conclusion that an employee majority gave valid bargaining authorization to the Union.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra*, p. A13.

STATEMENT OF THE CASE

Aero Corporation is a Georgia corporation licensed to do business in the State of Florida. Aero's principal place of business was in Atlanta, Georgia, at the time the Union began its organizing activities. This case has to do with the Company's Lake City, Florida, plant where the Company is engaged in the repair, overhaul, and modification of aircraft and related components.

Some years before the interest of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) ("the Union") in Aero's Lake City operations, the Company's plant in Atlanta voluntarily recognized another labor organization as employee bargaining representative on the basis of an employee straw vote (R 147-148).

The Union's organizing activities appear to have begun in late February, 1962. On April 9, 1962, the Union directed a letter to Aero about bargaining (R 209) and on the following day, April 10, 1962, filed a Petition for Rep-

resentation pursuant to Section 9 of the National Labor Relations Act, hereinafter referred to as "the Act." This petition was served on Aero on or about April 11 or April 12, 1962. On April 16, 1962, after having received a copy of the Union's petition, Aero sent a letter to the Union in response to the April 9 letter about recognition, stating its doubts that the Aero employees desired the Union to represent them (R 210). The National Labor Relations Board ("the Board") hearing on the Union's election petition was held on April 26, 1962, with two elections later conducted by the Board. The first election was held on June 1, 1962, and the second on August 10, 1962. The Union failed to receive a majority count on both occasions. The Union lost the first election by a 49 to 43 vote[1] and the second by a vote of 59 to 55. It is interesting to note that some 24 employees in the unit failed to cast ballots in the June election and 10 failed to vote in the August election.

On July 31, 1962, the original charges in this case were filed by an employee. But it was not until October 25, 1962, a month after the Board's complaint was issued, based on the initial charge, that the Union filed charges alleging a refusal to bargain. These charges were served on Aero on October 26, 1962. This date is very significant to the case inasmuch as the six-month statute of limitations as provided in Section 10(b) of the Act would preclude the finding of unfair labor practice grounded on events occurring before April 26, 1962.

The Board hearing was held in Lake City, Florida, over a month's period from February 18 to March 22, 1963. The Trial Examiner concluded in his eighty-six page decision dated April 9, 1963, that Aero had violated Sections

1. There were four challenged ballots not counted which would have not been determinative of the election.

8(a)(1)(3) and (5). In connection with his refusal to bargain findings, he concluded the Union to have had a majority of 50 out of 98 employees as of April 8, 1962, and 62 out of 106 employees as of April 29, 1962. The Board, in its decision issued November 30, 1964, substantially confirmed the Trial Examiner's findings. The Board did, however, contrary to the Trial Examiner, include one additional employee Union authorization to its April 8, 1962, card count. It added the name of Monroe Lindsey, who claimed in his testimony that he signed a Union card but such card was never produced or put in evidence. Also included by the Board in its tally is the authorization of Bertha Mae Milton, whose card admittedly was never identified, offered or placed in evidence[2] In its November 30, 1964, decision, therefore, the Board concluded the Union to have had a bare majority of 51 out of 98 employees based on the unit work force as of April 8, 1962.

The Board filed a Petition for Enforcement of its order in the above case in the United States Court of Appeals for the District of Columbia Circuit on August 24, 1965, pursuant to Section 10(e) of the Act. The Union had previously filed a Petition for Review of a portion of the Board's order not in issue here under the provisions of Section 10(f) of the Act. The Court of Appeals confirmed the Board's findings in its June 15, 1966, decision and granted enforcement of the Board's order in its judgment of the same date.

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary to resolve the conflict among the Circuit Courts of several questions of great importance to the Federal labor laws, and to review er-

2. Petitioner contends the findings as to both Lindsey's and Milton's Union authorization are improper. Such evidence is neither "substantial" nor in Milton's case, "on the record."

roneous findings of the Court below upon basic questions as to the interpretation of such laws.

To briefly summarize in part the issues raised, the Circuit Courts appear to be in conflict as to the validity of ambiguous dual purpose Union authorization cards and as to what type misrepresentations about the cards' use will render such cards as invalid card "votes" for the Union. And in connection with this question, there is also conflict as to rights of the parties at an unfair labor practice hearing to examine witnesses as to which alternative purpose the signer executed his authorization card.

The question also involves the right of "free speech" guaranteed in Section 8(c) of the Act and the use of privileged statements under this Section as a basis for conclusions grounding unfair labor practice findings; and the interpretation of Section 10(b) of the Act limiting issuance of complaints grounded on events occurring more than six months before the filing of the charge. In addition to several other questions of equal importance is the question of the validity of union authorization cards where supervisors have assisted the Union's organizing by circulating, soliciting and collecting Union cards.

In view of recent trends in the National Labor Relations Board "certifying" unions in increasing numbers without an election being conducted under Section 9 of the Act, it is imperative that the Board be given meaningful guidelines in the establishment of reasonable standards for acceptance of union authorization cards as employee "votes" for union representation.

Unions should not be allowed to use ambiguous and legalistically worded authorization cards not clearly indicating that the card may be used as a "vote" for the union, without an election. Similarly, whatever language is con-

tained on its cards, unions should not be allowed to secure authorization cards by misrepresentation to employees that an election to decide representation will be held in the future and they are not finally obligated or committed to the union, and then later obtain "certification" without an election. Great public interest in this area as well as criticism from the press and bar of the Board's proceedings emphasize the great need for the Court's reviewing these important areas of our labor laws.

Discussion of Questions

(1) Whether privileged communications of an Employer with employees under protection of Section 8(c) of the Act may be a substantial basis for findings of fact and of witness credibility where such findings are used as a basis for concluding Sections 8(a)(1), (3) and (5) of the Act have been violated.

The Board in affirming the credibility findings of the Trial Examiner upon which all of the findings in violation of Sections 8(a)(1), (3) and (5) are based, clearly used Aero Corporation's "free speech" statements to its employees as a prime basis for its conclusions. Obviously, there must be a starting place or basis for these conclusions. The Petitioner contends that the starting place for the credibility resolutions made, and consequently the conclusion that the Act was violated, is the fact of Aero Corporation's opposition to the Union and the admittedly permissive campaign material it used under protection of Section 8(c) of the Act.

Section 8(c) of the Act expressly gives to employers and unions alike the right to freely communicate with employees as long as such communications are not coercive. In the language of this Section, it is stated that:

> "The expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provision of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

In making the credibility findings upon which the Board's entire case is grounded, the Trial Examiner clearly indicates in his Decision that he has based his findings upon privileged communications as defined in Section 8(c) by stating as follows:

> ". . . the Respondent's obvious hostility to the organization of its employees and the intensity and persistence of its anti-UAW campaign, which are so clearly shown by its admitted conduct are relevant, and must therefore be considered as a substantial factor in evaluating the good or bad faith of the Respondent in insisting upon a Board election, and also the credibility of Coley, Hansen, and the supervisors in their denials that they committed the individual acts of interference in violation of Section 8(a)(1) of the Act, of which they are accused in the Complaint and the testimony of the General Counsel's witnesses." (R 244).

And later in this Decision it is further stated by the Examiner that:

> "In evaluating the conflicting testimony, I have considered not only the demeanor of the witnesses. . . . In addition, a material background is provided by the Respondent's obvious hostility to the UAW's representation of its employees, shown by the Respondent's letter rejecting the UAW's bargaining request, the cartoons it posted on the Bulletin Board, the printed material it distributed and its letter to the employees, signed by its vice president. . . ." (R 259-260).

In support of its findings the Court below urges *Hendrix Manufacturing Company* v. *NLRB*, (C.A. 5, 1963) 321 F. 2d 100 as controlling authority. The Petitioner contends that *Hendrix, supra*, supports an entirely different proposition than that presented here. In *Hendrix* the Fifth Circuit said that "anti-union statements may be used for 'background' to measure conduct and that such 'background' would bear on the questions whether from the listeners' point of view statements by management constituted intimidation and coercion. The Board's Decision, however, goes considerably further than merely using the fact of the Company's opposition to the Union as a 'background' to measure the effect of statements by the Company. Instead, material under protection of the Act was used as a substantial factor in the Examiner's Decision as to whether individual witnesses gave accurate and truthful testimony, and whether the Company was motivated by "bad faith". This is not proper. Section 8(c) precludes the evidentiary use of non-coercive statements of any description as a basis for an unfair labor practice finding. Evidence as to the Company's opposition to the Union and its campaign utterances have been used by the Board as the prime basis for evaluating evidence, and the finding of an unfair labor practice violation. Using such evidence as a "background" to measure the coercive "temperature" of alleged unfair labor practice conduct is hardly the same thing as using such "backgrounds" as evidence that certain conduct did in fact occur.

In *NLRB* v. *Colvert Dairy Products Company*, (C.A. 10, 1963) 317 F.2d 44, the Tenth Circuit reaffirmed the rights established by Section 8(c) in stating the following:

> "It seems patently clear that the Trial Examiner has taken the lawful statements of respondent, protected as they are by the First Amendment and specifically

authorized by Section 8(c) of the Act, as a basis authorizing an unfavorable inference in the appraisement of respondent's conduct and the credibility of its witnesses."

The Court also later commented that:

"But it would be unrealistic indeed to expect management to use words of conviction in an effort to persuade an employee to vote against unionization without the presence of 'anti-union animus.' In the matter of the election the management is, of course, anti-union. The union is equally anti-company. It is necessarily so and hostility toward each other in such regard is not an unfair labor practice."

An even more disturbing conclusion, however, is the finding of "bad faith" substantially based upon statements protected by the Act. Section 8(a)(5) provides only that a "bad faith" refusal to bargain is violative. It would seem, therefore, that since the "bad faith" factor of the refusal to bargain charge is what this case is all about, a "bad faith" finding based wholly or in part upon admittedly permissible campaign utterances and the Company's posture in opposition to the UAW Union would be highly questionable.

In again quoting from *Colvert Dairy Products, supra,* the Petitioner urges that:

"The Act (Section 8(c)) specifically provides that privileged communications between employer and employee shall not be evidence of an unfair labor practice. To allow the privileged communications to become an instrument of destruction by indirection is to frustrate the right of free speech and the privilege of persuasion."

The basis for the Board's unfair labor practice findings as well as its credibility conclusions are substantially grounded upon privileged material under protection of the

Act. Consequently, witness credibility findings as well as the Board's unfair labor practice findings based on such evidence cannot be allowed to stand and should be set aside.

The right of free speech secured by Section 8(c) is indeed a vital part of the Act and of the country's entire labor relations structure. Free speech in union-employer matters was recognized by this Court[3] long before the inclusion of this Section in the Act and because of its importance, Congress thought it necessary to make such rights an integral part of the Act. The Petitioner strongly urges that this issue is a question worthy of thorough review by this Court.

(2) Whether the six month period of limitations provided in Section 10(b) of the National Labor Relations Act, as amended, bars the finding of a refusal to bargain violation under Section 8(a)(5) where the refusal to bargain allegation is grounded upon events occurring more than six months before the filing and service of the charge.

In concluding that a refusal to bargain finding may be grounded upon events predating the six months' limitation period of the Act, the Court of Appeals found the union's original request to be in the nature of a continuing bargaining request which tumbled into the 10(b) period. Before dealing with this particular ruling the Petitioner would point out the following facts surrounding the union's request to bargain.

The union sent out its request on April 9, 1962, and without waiting for a response from the Company chose to seek recognition through the National Labor Relations Board by filing a petition for an election. This fact alone

3. *NLRB* v. *Virginia Electric & Power Co.*, (1941) 314 U.S. 469; *Virginia Electric & Power Co.* v. *NLRB*, (1943) 319 U.S. 533.

would cast some doubt as to whether the Union ever sincerely was seeking anything more than a chance to attain majority status by virtue of a Board election. At no time did the union appear to honestly want to be put to the test of proving majority status by a card showing, instead seeking only a chance to become the employee's representative through the ballot box. This is seen in the fact that the union never made an offer to prove its majority by a card check and further that it continued its attempt to gain recognition not once, but twice through the Board's election procedures.

In brief summary of the background facts, by letter to Aero Corporation dated April 9, 1962, the union claimed to represent a majority of the employees in the bargaining unit (R 209). The following day, April 10, 1962, without waiting for an answer to its letter, the Union filed its representation petition with the Board. By letter dated April 16, 1962, the Company denied that its employees desired Union representation (R 210). The hearing on the petition was held April 26, 1962. As evident from these findings, the Union's request to bargain and the Company's response all occurred outside the 10(b) period. The Petitioner contends that the duty to bargain arises only upon the request of a union to bargain,[4] and there being no request to bargain within the limitations of Section 10(b) there is no duty to bargain and consequently no violation of Section 8(a)(5) of the Act.

As suggested earlier, the Petitioner strongly urges that the facts of this case fall squarely within the proscriptions of *Local Lodge No. 1424, Machinists, et al.* v. *National Labor Relations Board*, (1960) 362 U.S. 411. Although the pro-

4. *NLRB* v. *Columbian Enameling & Stamping Co.*, (1939) 306 U.S. 292.

nouncements of this case would seem to adequately define the meaning of Section 10(b) of the Act, this Court's earlier pronouncements on this issue appear to have been rejected.

Section 10(b) of the Act reads in pertinent part:

> "Provided. . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made. . . ."

As correctly stated by the Court of Appeals in its opinion ". . . the Board must establish an unfair labor practice occurring on or after April 26, 1962." Based on the proscriptions of Section 10(b), clearly such a violation has not been established.

In *Local Lodge No. 1424, supra,* the Board unsuccessfully contended that while an illegal union security clause executed outside the 10(b) period was itself time barred that the "continued enforcement" within the period of limitations set up a continuing violation not itself time barred. The Petitioner therein successfully contended "that standing alone, the union security clause and its enforcement was wholly innocent" and that since the complaint was based upon the time barred unlawful execution of the agreement that the "event itself could not be utilized to infuse with legality the otherwise legal union security clause or its enforcement." The Petitioner's further contention in that case similarly applies to *Aero*:

> ". . . to apply in this situation the doctrine that § 10(b) is a statute of limitations, and not a rule of evidence is to circumvent the purposes of this Section and that acceptance of the Board's position would mean that the statute of limitations would never run. . . ."

The proper test to determine whether unfair labor practice charges are time barred is to look backward six months

from the filing and service of the charge for supporting evidence. Events past this period cannot be used as the basis for an unfair labor practice. There is nothing in the record bearing upon voluntary recognition and only one event pertaining to certification during this period. This is the April 26, 1962, representation hearing itself and statements of position by Aero's counsel as to Aero's April 16, 1962, response to the Union occurring outside the 10(b) period.

The Union's request to bargain did not occur within the six month period; the filing of the representation petition with the Board did not occur within the six month period; nor did the Petitioner's response to the Union's bargaining request occur during the 10(b) period. And these specific events are precisely the occurrences upon which the Court of Appeals has based its decision. Irrespective of other contentions urged in this petition, without the benefit of these happenings, it cannot be shown that the Petitioner had a duty to bargain or that it refused to bargain within six months of the date of the filing of the charge.

It is pointed out in the opinion below that it is open to the Board to refer to previous acts to shed light on the true character of matters occurring within the limitations period.[5] The Court of Appeals, however, did not go far enough with its quotations from the *Machinists Local 1424* decision. For the Court pointed out subsequently that:

> "... in applying rules of evidence as to the admissibility of past events, due regard for the purposes of §10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within

5. 362 U.S. at 416.

> the limitations period; and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice."

As in *Local Lodge No. 1424, supra,* the entire foundation for the refusal to bargain findings in *Aero Corporation* is "inescapably grounded on events predating the limitations period" and consequently directly at odds with the purposes of the §10(b) proviso.

The Fifth Circuit came to the same conclusion in *American Federation of Grain Millers* v. *NLRB,* (C.A. 5, 1952) 197 F. 2d 451, where it stated that:

> "Finally we agree with the Board that what the Union is in effect seeking to do is mere connective incidents wherewith to bridge the fatal gap in time between the happenings really relied on as unfair labor practices and the six months bar, hoping thereby to cross over the six months barrier which otherwise could preclude the charge."

The same Court in a more recent case, *Gulfcoast Transit Co.* v. *NLRB,* (C.A. 5, 1964) 332 F. 2d 28, in a similar situation stated that:

> "A careful review of the record fails to convince us that the conduct of the company with its employees during the 10(b) period . . . supports the charge of unfair labor

practice. It is only when events beyond the bounds of the period are brought into evidence can the charges be sustained. . . ."

And, in addition to the views of the Fifth Circuit, a number of other of the Circuit Courts and the Board itself earlier refused to find merit in the District of Columbia Court of Appeals continuing tort theories. *NLRB* v. *Childs Co.*, (C.A. 2, 1952) 195 F. 2d 617; *NLRB* v. *Pennwoven*, (C.A. 3, 1952) 194 F. 2d 521; and *In re Knickerbocker Manufacturing Co.*, (1954) 109 NLRB 1195.

The Court of Appeals has attempted to nullify the pronouncements of this Court in *Local Lodge No. 1424, Machinists, et al.* v. *National Labor Relations Board*, (1960) 362 U.S. 411, by concluding the Court's finding there cannot be "viewed so broadly" and citing its recent decision in *Local 152, Teamsters* v. *NLRB*, (C.A. D.C., 1965) 343 F. 2d 307.

Although the Petitioner disputes the application of the authorities cited by the Court below and the Board, there appears to be significant distinction between the cited authorities and *Aero*. In *Local 152, Teamsters*, which significantly did not involve a 10(b) question, the Court of Appeals concluded the union's request was a continuing one in that the union's two requests to bargain were "continuous" insofar as the Court's conclusion that the request to bargain was still in effect at the time the union actually attained a majority status one week subsequent to the time the request was made. Also here, the employer never disputed the union's claimed "representative capacity". The Petitioner suggests that absent the 10(b) issue this decision is not relevant to *Aero*.

Similarly those cases contended by the Board to support the findings do not appear to be applicable here. *Scobell Chemical Company* v. *NLRB*, (C.A. 2, 1959)

267 F. 2d 922, offers little real support since the union there supplemented its bargaining request by an immediate strike for recognition. Under such circumstances it is apparent that the strike itself was considered to be an independent request for bargaining. In addition, in *Scobell* the employer there never disputed the union's majority claim as did Aero in its April 16, 1962, letter. But even in this decision, the Second Circuit suggested the difference between its finding and *Aero* in commenting that "It may be that a request for recognition and nothing more, does not automatically become a continuing request . . ." After all there is a distinct difference between being recognized without the processes of the Board and being certified through Board procedures. Board certification has certain practical advantages as well as advantages provided in the Act itself. Aside from the fact that the union obviously sought Board certification rather than recognition there simply are no events occurring within the 10(b) period to support the Court's conclusion that Aero was under a duty to bargain or that it illegally refused to bargain.

Other cases relied on by the Board likewise also do not apply to *Aero*. *NLRB* v. *Burton-Dixie Corp.*, (C.A. 10, 1954) 210 F. 2d 199, which significantly did not involve a 10(b) issue, has to do with the same proposition found in *Local 152, Teamsters*. As in the latter case, in *Burton-Dixie* the union requested recognition but did not actually secure majority status until the following day. In examining the facts, it is clear that at a time when the union did have a majority stature it again approached the company and mentioned the earlier conversation with the local plant manager and asked to reopen yesterday's discussion. Although the union did not specifically or formally request recognition, the statements of the union representative and responses of the company's general manager that the union

had never been in any of the company's plants, makes it clear that the parties understood the reason for the visit whether the exact words were spoken or not. A request to bargain was therefore inferred from actual statements of the parties at a time when the union had its majority and was not solely a request "continued" from the previous day.

As pointed out earlier the only occurrence within the 10(b) period having any bearing whatever upon the Union's untimely bargaining request was on April 26, 1962, the date the Union's election petition was heard before the Board. At this hearing the Employer stipulated as follows:

> "The Employer is willing to stipulate further that by way of letter dated April 17, 1962, which was written after the petition was filed, that the Employer declined to recognize the union without certification by the National Labor Relations Board" (R 14-15 and R 99 in Appendix "D" to Petitioner's Court of Appeals Brief).

This stipulation is the only portion of the Representation Case proceeding made a part of the case and record here urged for review and clearly shows that the Petitioner was stating a legal position and not denying recognition as contended by the Board. In spite of this fact, however, the Court below cited a further comment by the Petitioner's counsel in response to a Board Agent's inquiry at the hearing. At the time of the hearing, the General Counsel's request to the Trial Examiner to include such matters by taking official notice of those proceedings was specifically rejected on two separate occasions. In spite of these rul-

ings the Board on its own motion inserted this material into the record in the Court below.[6] The Court of Appeals in its decision correctly concludes that "an attorney's reaffirmation of the Company's position arising out of a past action should not ordinarily of itself be sufficient to constitute a reoccurrence for the purpose of a limitation provision."[7] The Court below, nevertheless, in its decision makes vague reference to this very material the Petitioner contends is completely outside the record. This should not be. The Petitioner respectfully contends that evidence outside the record is not available for argument nor should it be recognized as part of the record by the Court by the Court in its deliberations.

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6. In the Court below the Board attempted to insert this material into the record by including it in its Brief as a "Selection" from the representation case. But this "evidence" is not a part of the Record and cannot be treated as such. The Examiner specifically ruled at two points in the record that he was denying the General Counsel's motion to "take notice generally of the proceedings in the RC Case" (R 13, 14). In addition, the General Counsel in making his motion never requested notice be taken of the entire proceedings and requested that the Examiner take official notice of the representation hearing formal papers only (R 13). The only evidence in the record, therefore, pertaining to the Employer's stipulation and statements at the hearing is contained in the transcript as cited above and also as contained in the General Counsel's Exhibit 3(c). This exhibit is the Aero Corporation's motion to correct the transcript of record of the representation hearing held on April 26, 1962.

7. In *Gillcraft Furniture Company*, (1953) 103 NLRB 81, 97-98, the Trial Examiner's Intermediate Report as adopted by the Board said: "I cannot conclude that the mere presentation of such a petition, under the circumstances, should properly be construed as a bargaining demand, within the requirements of Section 8(a)(5) of the Act. . . . If this conclusion is sound . . . the colloquy at the hearing on the petition, to which the Board's attention has been directed, in which the Respondent acknowledged its refusal to recognize the Union prior to certification, adds nothing to the case and should not be considered equivalent to a refusal to bargain." Similarly, in *Laabs, Inc.*, (1960) 128 NLRB 374, it was held that the filing of a representation petition does not constitute a request for bargaining.

In summarizing the decision the Court found to support its findings and those authorities relied upon by the Board, these points are clear: (1) The Court's findings as to a "continuing" request to bargain in *Local 152, Teamsters*, and in *Burton-Dixie*, do not involve the 10(b) question and appear only to define "continuing request" in terms of allowing a union to attain majority status within a day or week from the time its request is made rather than at the precise instant the request is made. (2) In the instance of the *Scobell Chemical* Case and the *Burton-Dixie* finding there was a constructive new bargaining request rather than a "continuing" request evident in the form of a strike for recognition in the former case and oral communications between the parties in the latter case.

The Petitioner urgently requests that the Court review this very important issue. Since the Act clearly proscribes the use of events and happenings outside the six months limitation period as a basis for unfair labor practice findings, how can a request to bargain "continue" when the happening which is said to "continue" itself occurred outside the prescribed period. The decision of the Court below is clearly in error and flies directly in the face of this Court's past pronouncements as to Section 10(b) of the Act.

(3) Whether, if the Section 10(b) period of limitations is fatal to a refusal to bargain finding, an affirmative bargaining order is a permissible remedy for violation of Section 8(a)(1) and (3) of the Act and further, whether such an order is permissible where a question of the Union's current de facto majority status may exist.

As affirmed by the Court of Appeals, the Board concluded that "even if the 10(b) period of limitations were fatal to an 8(a)(5) finding, an affirmative bargaining order would be an appropriate remedy to the 8(a)(1) violations

found herein, and to restore the *status quo ante*." The Petitioner here questions the Board's power generally to order an employer to bargain with a union where it has not been shown by valid evidence that the Employer has such a duty or that the Union even sought anything more than an opportunity to prove majority status through an election. A further material point as to the appropriateness of an 8(a)(5) remedy for an 8(a)(1) violation here is the UAW's apparent lack of a current *de facto* majority status. According to Company officials on October 1, 1966, Aero Corporation had approximately 500 employees in the bargaining unit, as opposed to approximately 100 to 120 on the payroll during 1962. While the fact obviously could not be contained in the record since the Board and the Court below in other decisions have indicated such circumstances have a direct bearing upon an employer's bargaining responsibilities, the Petitioner believes that such fact should be brought to the Court's attention.

While the Petitioner does not dispute the Board's power to exercise reasonable discretion in devising appropriate remedies under the law for violations of the statute, it should not be allowed to deny to employees their rights under the guise of exercising so-called "discretionary" powers. Here the Record clearly discloses that many employees initially evidenced interest in the Union with the understanding that they would have an opportunity to vote their preference for or against the Union at a later date. And the fact that an election was to be held was made known to all those solicited to sign cards. Whether such fact was represented as being the *only* purpose of the card or merely a purpose, the fact remains that since an election was expected, even the staunchest Union supporter had reason to believe that he would have an opportunity to change his mind later by secret ballot. Under

these circumstances, the card signers cannot be said to have finally appointed the Union as its representative.

In *NLRB* v. *Flomatic Corp.*, (C.A. 2, 1965) 347 F. 2d 74, the Second Circuit refused to enforce the Board's affirmative bargaining order in remedy to violation of Section 8(a)(1). As in *Aero*, there was no valid request to bargain established in the *Flomatic* record to support a refusal to bargain violation or affirmative bargaining order.

The Court below cites *NLRB* v. *Delight Bakery*, (C.A. 6, 1965) 353 F. 2d 344, 347, as guiding authority to its support of the Board's theories here. There are significant differences, however, in the Sixth Circuit's decision and in *Aero*. The background of misrepresentations as to the intended use of the Union cards as well as the confusing language on the Union authorization card itself is not found in the cited decision. As distinguished from *Aero*, also found in *Delight Bakery* is a valid bargaining request, a factor indicated by the Sixth Circuit as significant in its distinguishing that case from *Flomatic Corp.*

But a most significant principle discussed in both the *Delight Bakery* and *Flomatic Corp.* decisions is that an affirmative bargaining order, unlike certification, does not require an employer to bargain with the union for at least a year without regard to its *de facto* majority status. Even more positively in *Delight*, the Court observed that it is "clear that following compliance respondent or its employees may petition for an election if in doubt about the union majority. Labor Management Relations Act (Taft-Hartley Act) Sec. 101, 61 Stat. 144 (1947), 29 U.S.C., Sec. 159 (c)(1)(A)ii 1965; 61 Stat. 144 (1947), 29 U.S.C., Sec. 159 (c)(1)(B) 1965; *Brooks* v. *National Labor Relations Board*, . . ."[8] And under appropriate facts, the policy of the

8. *Brooks* v. *NLRB*, (1954) 348 U.S. 96.

NLRB is to grant such petition without consideration of the one-year time limit applicable to bargaining rights based on certification following an election. *Armco Drainage & Metal Products,* (1956) 116 NLRB 1260; *Ruffalo's Trucking Service, Inc.,* (1955) 114 NLRB 1549.

As observed by the Court in *NLRB* v. *Flomatic Corp., supra,* a bargaining order is strong medicine and while such an order may be designed to deprive the employer of a chance to profit from a stubborn refusal to abide by the law and undoubtedly operates to deter employers from adopting illegally intrusive election tactics, that its potentially adverse effect on the employer's Section 7 rights must not be overlooked. *Medo Photo Supply Corp.* v. *NLRB,* 321 U.S. 678, 686 (1944). The Second Circuit went on to comment in *Flomatic* that Section 7 protects the rights of employees to join or refrain from joining labor organizations and that such rights are implemented by Section 9(c)(1), which provides for representation by secret ballot. And the Court here specifically warned that:

> "Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees and thus frustrate rather than effectuate the policies of the Act."

For the reasons suggested in the foregoing paragraphs, the Court's finding that absent an 8(a)(5) finding an affirmative bargaining order is an appropriate remedy cannot be sustained. In view of the background and circumstances of this case, it is urged that the Board has far exceeded the bounds of reasonableness in suggesting that Aero must bargain with the Union even in the absence of an 8(a)(5) violation. But at most, in view of the tremendous increase in the size of the bargaining unit, the

Board's order should be modified to the extent that the Board be directed to determine if the bargaining unit has increased disproportionately and if confirmed, that an election be conducted at the Petitioner's plant to determine the Union's *de facto* majority status. The increase in the bargaining unit's size came about solely because of unusual Company growth over the past several years and was in no way connected with the Company's dispute with the Union. Such modification of the Board's order is an absolute necessity in protection of rights guaranteed to some five hundred employees under Section 7 of the Act.

(4)(a) Whether a Union authorization card is language stating it is not an application for membership and its purpose in the alternative is for an election is ambiguous and equivocal and therefore invalid designation of the Union as the signer's collective bargaining representative.

The Union's authorization cards were the "ballots" counted by the Board and the Court of Appeals in determining whether a majority of Aero's employees had "voted" for Union representation. The language of the card is ambiguous and very misleading and possibly was designed with this in mind. Although the Court of Appeals concluded the "overall purpose" of the card "is clear", the Petitioner strongly urges that the card's language is highly misleading and was used by the Union to misrepresent and becloud the use to which such cards would be put.

An examination of the Union's "ballot" indicates that the initial language contained in the card states that the employee has designated the UAW as his "collective bargaining representative". Granted that this statement standing alone legally designates valid authorization for collective bargaining, the Petitioner questions whether the full import of such labor relations jargon is really

understood by the average working man. Do signers actually realize that at the instant they sign such a card, they have cast an irretrievable "yes" ballot for the Union? The Petitioner thinks not.

The language of the card does not stop here, however, for in small print at the bottom of the card the employee is reassured that he is not finally committed or obligated to the Union by the language, "This is not an application for membership". While those involved in the labor relations matter may be fully aware that a "card vote" for the union and union membership is not the same thing, again the Petitioner urges that the average working man would likely conclude such statement gives him a loophole as to his choice until such time as he does finally decide about the Union in the voting booth.

The other fine print on the card states the alternative purposes, for which the card is intended. If the initial language was designed to establish the card's purpose, why must the card later define the uses to which it may be put? The Petitioner contends that by the card's language on "only" use the card may be put to is "for an election" to the exclusion of other purposes.

The Petitioner again submits that the disclaimer that the card is not an application for membership and that the card's "only" use may be for an election clearly negates and renders ambiguous other language contained on the card. And contrary to the Board's contentions, the fact that the language on the card the Petitioner finds objectionable is in fine print does not render the language less meaningful or less objectionable, but more so.

The issue presented here has come up in several Courts of Appeal, with different results. The Fifth Circuit Court of Appeals in *NLRB* v. *Peterson Brothers, Inc.*, (C.A. 5, 1965)

342 F. 2d 221, found an almost identical card to be invalid, while the Seventh Circuit in *NLRB* v. *C. J. Glasgow Co.*, (C.A. 7, 1966) 356 F. 2d 476, reached the same conclusion as the District of Columbia Court of Appeals did in this case.

In *NLRB* v. *Peterson Brothers, Inc., supra,* the Court rejected the Board's *only* rule that when card signers were not told the *only* purpose of the designation was to obtain an election that some three Union cards should be included as valid authorization in determining majority status. In disagreeing with the Board, the Court said that:

> "In view of the language on the face of the card that 'this is not an application for membership' and the language in the alternative is 'for an NLRB election' we think there was a burden of the General Counsel to establish by a preponderance of the evidence that the signer of the card did, in effect, what he would have done by voting for the Union in a Board election. We think that in refusing to consider the objective intent of the signer of the card, in light of the ambiguity on the face of the card, the Board erred . . . We conclude that the Board's finding to the contrary is not based on substantial evidence on the record considered as a whole."

In a separate opinion in *NLRB* v. *S.N.C. Manufacturing Company,* (C.A., D.C., 1965) 352 F. 2d 361, Judge Burger strongly criticized the use by Unions of misleading union card language in these words:

> "Our observation in *Joy Silk Mills* v. *NLRB* . . . that 'an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought the card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent' should not be taken to license the use of misleading authorization cards. If such cards are to substitute for a secret ballot, their terms ought to be unmistakable."

But not only have the Courts criticized the use of vague and ambiguous authorization cards, but similar criticism has been voiced in law review articles. In a recent article contained in the *Labor Law Journal*,[9] the author analyzed the appropriateness of the criteria used by the Board in deciding such cases.

As pointed out in this article, the Board's current rule established in *Cumberland Shoe Corp.*, (1963) 144 NLRB 1268; *NLRB* v. *Cumberland Shoe Corp.*, (C.A. 6, 1965) 351 F. 2d 917, as restated in *Aero* and accepted by the Court below, is that the Board will tally cards signed by an employee even though they may have been procured through misrepresentation that the cards would be used to obtain an election. In the eyes of the Court of Appeals such misrepresentation apparently is not enough to invalidate authorization. According to *Cumberland Shoe* and *Aero* the only misrepresentation as to the cards' purpose sufficient to invalidate a card is a statement by the Union organizer that the *only* purpose of the card is to obtain an election.

As further suggested in this article, the "only" rule is "unrealistic, unworkable and unfair" and "stretches Joy Silk tenuous fabric too far." The criticism here, as suggested in Judge Burger's comments in *S.N.C. Manufacturing Company, Inc.*, and in the *Peterson Brothers* decision, is that it is simple for the Union to design an unambiguous form for union authorization. A union could easily use one type of card for an election and another for recognition without an election, or at least could prepare a card which makes it clear that the card may be specifically used as an unconditional "yes" ballot for the union. Instead, however, the Union here has artfully constructed its authoriza-

9. *The Use and Abuse of Authorization Cards in Determining Union Majority*, by Robert Lewis, L.L.J. Vol. 16, Number 7, July 1965, page 434.

tion card in such a way as to assure prospective signers that they are not really in the Union nor finally committed to it and that an "only" purpose of the card is to have an election, at which time the employee may finally make his choice.

(b) Whether the misrepresentations made to signers of Union cards that they were under no obligation to the Union; that the cards were part of a survey to determine employee interest in the Union; and that the cards were to get an election and there would be an election, taken in context with the card's language that it is not a membership application and is for use in support of demand for recognition or for an NLRB election, renders the cards of such signers invalid.

Apart from the Petitioner's position that the Union authorization cards are objectionable *per se*, it is also urged that even assuming *arguendo* that the card's language is not objectionable, that the misrepresentations and statements made to card signers in context with the card's language renders such "authorization" invalid.

The decision in the Court below carefully points out that the Petitioner admitted having been allowed to inquire into representations made at the times the cards were distributed. Except in one instance[10] which was specifically cited to the Court below, this is true. But what is more significant is the fact that substantial and convincing testimony elicited as to these misrepresentations was ignored by the Court below, presumably because of its acceptance of the Board's *only* rule.

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10. When the Petitioner attempted examination of witness Hugh Fletcher (R 33), the Trial Examiner refused to allow counsel to inquire whether the witness in signing a card was told an election would be held. The Petitioner having been denied its admitted right to make this inquiry, this employee's card cannot be considered in determining the Union's majority status.

As suggested earlier, this rule should be rejected, but rejected or not, in a number of instances card signers were assured that they and the other employees would get to vote about representation in an election. Surely such assurance must be considered in the same light as an *only* misrepresentation. The Petitioner can see little difference here.

Misrepresentations were made to a number of employees which the Petitioner contends clearly fail to meet the very rule the Court itself has approved. Witnesses were told their cards were to be used in some kind of a survey to test employee Union interest, that there would be an election; and that card signers were not obligated to the Union in signing the cards. For instance, the following testimony is found in the Board hearing transcript.

Broadway Oaks testified that when he signed a card, it was his understanding that the Union was running some kind of a survey, since he was informed by the Union that the meeting was to see how many people might be interested in a union so that it could be determined if there were sufficient interest for an election (R 64a and TX Ex. 11[11] in Appendix "D" to Aero's Brief filed in the Court below and a part of the record lodged in this Court).

David Morris also testified that at the meeting, he was told that by signing a card, there would be an election and that Mr. Quatrini also said that he was running a survey to show whether the employees wanted it (R 137).

Nan Harrington testified that when she signed a card, she was told that she was not obligated to join the Union,

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11. Refers to Trial Examiner's Exhibit No. 11. At the hearing of the case the Trial Examiner called some thirteen of the General Counsel's witnesses to testify as his witnesses when the General Counsel refused to call them. These are exhibits the Examiner himself offered in evidence.

that "it was just to sign a card and if it was enough an election would be held" (R 140).

Ronald Kaye testified that when he signed a card, it was explained to him that "it was interpreted to be some kind of a tally of those people that would want the Union to come into the Company . . ." (R 82-83).

Byron Bryan testified that at the time he signed a card, he was told that by signing the card he would get to vote in an election (R 118).

Nevin Nettles states that prior to signing his card, he was told by Mr. Quatrini that if enough people signed a card, there would be an election (R 112-113).

James Bush states that he was told that the card would not bind him in any way and also that "in signing the cards if the majority—if they got a majority there would be—it would be eligible for them to apply for an election to see whether the Union would be voted in or not voted in" (R 119-120).

Patricia Ann Adams stated that some one asked at the meeting how the Union would approach Aero and was advised that the Union would write a letter asking for an election, and if the letter were ignored, the Union would demand an election (R 27-28).

Louise M. Cumbess testified that at the meeting, the employees were told that if they signed a card, they would get an election and that this was "the reason for signing the card and if they had enough people they wanted an election" (R 64b-65).

Roger Davis testified that at the meeting, the question came up from the floor if "these cards were being held liable, you know, for the Union", with Mr. Quatrini replying that "No, we are not being held liable that we had to join the Union, or anything like that" (R 83).

Mike Collins says that he was told that in signing the card that he was not obligated and that signing "was more or less to see the literature and I received letters by the Union and things that they intended to do" (R 2085-2086 in Appendix "D" to Aero's Brief in the Court below).

Frances Lovett said that when she signed a card that it was explained to her that she was not obligated in any way (R 50).

And according to the testimony of supervisor Willis Heard at a social gathering held at an employee's house one of the Union's supporters, Bill Godwin, asked some of those present to sign Union cards saying that they were under no obligation whatever and all "they wanted to do was to have an election". This testimony is undenied (R 187).

Whatever may be said as to the legal implication of the Union's authorization card, it is apparent from the evidence outlined above that the card's unclear wording was capitalized upon by the Union's representatives in getting cards signed. Time and again prospective signers were assured that they would be under no obligation to support the Union, and that an election would be held. And in some instances employees were told that their signature had something to do with a survey, not specifically to have an election, but to test employee interest about the possibilities of having an election.

The General Counsel was unable to contradict the testimony of these some dozen witnesses who described what they were told about the cards. Instead the Board now contends that even though such representations were made, that the Union's organizer saved the day by alternately mouthing the magic words about recognition and bargaining. The Petitioner suggests first that a dozen or

more witnesses did not confirm Union agent Quatrini's version of his representations. And secondly, the Petitioner suggests that if Quatrini did make the statements claimed by the Board simultaneously with the misrepresentations the dozen witnesses testified he made, that Mr. Quatrini's comments would do little to cure the effects of such misrepresentations. The misrepresentations attributed to the Union's agent are clearly objectionable and are fatal to the authorization of those employees misled by the Union. The weight of the evidence clearly refutes the Board's findings here and the Court of Appeals' affirmation of its findings.

In connection with Questions (4) and (5) presented in this Petition, there appears to be a great deal of confusion and uncertainty among the authorities as to these issues. The decision of the Court below is directly in conflict with the Fifth Circuit Court of Appeals' decision in *NLRB* v. *Peterson Brothers, Inc., supra,* in connection with the validity of dual purpose union authorization cards. The recent findings of the Tenth Circuit Court of Appeals in *NLRB* v. *C. J. Glasgow, supra,* appear to accept the same reasoning as found in Aero and consequently are in conflict with *Peterson Brothers, Inc.* The Union cards in question are substantially identical in all three of these cases.

In addition to the above conflict, the District of Columbia Court of Appeals' *Aero* findings are also in conflict with *Peterson Brothers, Inc.,* relative to the type misrepresentations made by union card solicitors which renders the cards invalid as "yes" ballots for the Union. The question raised in this Petition relative to misrepresentations necessarily involves the rule advanced by the Board that the sole misrepresentation relative to a Board election which will invalidate a union card is one to the effect that the

"only" purpose of the card is for a Board election. This rule was originally announced by the Board in the matter of *Cumberland Shoe Corp.*, (1963) 144 NLRB 1268, later affirmed in the Sixth Circuit Court of Appeals. *NLRB* v. *Cumberland Shoe Corp.*, (C.A. 6, 1965) 351 F. 2d 917. This Sixth Circuit decision as well as the *Aero* decision would also appear to be in conflict with *Peterson Brothers, Inc.*, relative to the "only" rule. The Board's own decisions may also be in conflict in this particular rule. As suggested by Board Trial Examiner John F. Funke in the matter of *Lenz Company*, (1965) 153 NLRB No. 120, the rationale in *Cumberland Shoe Corp.* establishing the *only* rule could not be squared with the Board's earlier pronouncements on the subject in *Englewood Lumber Company*, (1961) 130 NLRB 394. The *Englewood* rule provides that where employees were told the cards were necessary to hold a Board secret ballot, such cards were not counted in determining the Union majority status. This rule, incidentally, was in effect at the time of the Aero trial in February and March, 1963, and was not "modified" by *Cumberland Shoe Corp.* until October, 1963, six months after the *Aero* trial.

The Second Circuit's conclusion in *NLRB* v. *Gotham Shoe Manufacturing Co., Inc.*, (C.A. 2, 1966) 359 F. 2d 684, also seems to support the Board's *only* rule, contrary to *Peterson Brothers, Inc.* Although in *Gotham Shoe Manufacturing Co., Inc.*, the Court there was not confronted with the problem of a misleading dual purpose type card, it nevertheless held that representations by card solicitors that "the cards are for a vote" and "sign the cards so we can have a vote" were not sufficient to invalidate the cards.

And looming ominously in the background is the Board's ruling in *Gorbea, Perez & Morrell S. en C.*, (1963) 142 NLRB 475, wherein a Board majority authenticated cards obtained through fraudulent misrepresentation on

the ground that since Respondents' unfair practices had made a fair election impossible, the cards should be counted as votes regardless of such taint.

The Courts and the Board and its Trial Examiners are not only at odds as to what makes a valid union card and what misrepresentations void cards but criticisms of the Board's policies here have been made by a number of writers and the press as well.[12]

The legislative branch of our government has become equally concerned about the Board's procedures in requiring employers to bargain with unions without the employees themselves having a chance to vote in a Board election. In the last Congress, two bills were introduced in the Senate[13] to regulate the Board's procedures and policies in this area.

The Petitioner strongly urges the Court to review the Board's practices here and to lay down meaningful guidelines to the Board's ultra-election certification procedures.

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12. See David Lawrence, "NLRB Held Violating Right to Secret Ballot," *New York Herald Tribune*, February 9, 1965, and "The Real Issue in Union Voting," the *Evening Star*, Washington, February 17, 1965; Sandler, "Another Worry for Employers," *United States News & World Report*, March 15, 1965. "Protesting the Vote," *The Inquirer* (Cincinnati) (p. 6) July 13, 1965; "14-B Safeguards for Workers," *Memphis Press-Scimitar* (p. 4) July 27, 1965; "Reforming Taft-Hartley," *The Washington Post*, July 27, 1966; "Uncooked Labor Law," *New York Times*, July 28, 1965; and "Secret Elections on Unions," *Birmingham Post-Herald* (p. 8) August 6, 1965.

13. S.2113 introduced by Senator Jacob Javits, Congressional Record-Senate, June 14, 1965, page 12994; and S.2226, Congressional Record-Senate, June 29, 1965, page 14584.

(c) Where a Union authorization card states it is not an application for membership and provides in the alternative that the card may be used either for an election or in support of recognition, does such language establish the right at a Board hearing to question witnesses as to which purpose such card was executed.

As established in the record the Petitioner attempted to examine various card signers as to the purpose for which they signed Union authorization cards. In the Court of Appeals opinion, however, it was concluded as "proper to refuse to permit the employer to inquire into the subjective understanding of the employee who signed the card." It is vigorously contended by the Petitioner that not only does the card's objectionable language independently establish such rights, but further, that the substantial evidence of misrepresentation by the Union as to the card's purpose and use contained in the record must not be ignored. This additional factor strongly reinforces the Petitioner's argument and precludes consideration of this issue as a strictly theoretical question of whether the card's language alone creates such a right of inquiry.

As discussed in more detail in an earlier section of this Petition, the uncontradicted testimony of a dozen or more witnesses indicates the presence of various misrepresentations made to card signers. Three signers related that when they signed cards they were informed by Union agents that their signing of the cards was to be interpreted as a survey of some sort to determine if there were sufficient interest to have an election.[14] Others were told that their signing the cards placed them under no obligation to the Union; that they were not liable to join the Union; that their signatures were to allow them to find out more about

14. Testimony of Broadway Oaks R 64a; Ronald Kaye R 82-83; and David Morris R 137.

the Union; and that there would be an election held in the future.[15] The Petitioner contends, therefore, that where the card indicates it may be used for either of two purposes and the evidence reflects that a substantial number of signers were told that *the* purpose and reason for the cards was for an election and the signers were not obligated to the Union, that such circumstances should allow free inquiry as to the signers' intentions in executing the cards.

The Fifth Circuit, in fact, in its *Peterson Brothers* decision, went even further, suggesting the purpose to be a matter of affirmative proof for the General Counsel. In the Court's decision, it was concluded that:

> "In view of the language on the face of the card . . . we think there is a burden as on the General Counsel to establish by a preponderance of the evidence that the signer of the card did what he would have done by voting for the Union in a Board election. We think that in refusing to consider the subjective intent of the signer of the card, in light of the ambiguity on the face of the card, the Board erred."

(5) Whether the activities of supervisors in obtaining, distributing, soliciting and collecting Union authorization cards interfered in employee organizing rights guaranteed under Section 7 of the Act and thereby voided all or a part of the Union's authorization cards.

It was decided by the Court of Appeals that the activities of what it characterized as two "low level" supervisors did not interfere with employee organizing rights

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15. Testimony of Patricia Ann Adams, TR 435; Roger Davis, R 83; Louise M. Cumbess, R 64b-65; James Bush, R 119-120; Mike Collins, TR 2085-2086 in Appendix "D" to Aero Corporation's Brief to Court below, a part of the certified record lodged in the Court; Allamae Waters, R 64 and TX Ex. 9 in Appendix "D" to Aero's Brief to Court below; Nan Harrington, R 140; Frances Lovett, R 50; Byron Bryan, R 118; and Nevin Nettles, R 222 and TX Ex. 7 in Appendix "D" to Aero Corporation's Brief in Court below.

nor did such activities taint or void any of the employees' "ballots", their Union authorization cards. The Petitioner urges these findings to be erroneous.

The Act makes no distinction between types of supervisors and the fact that a supervisor is a low level or high level supervisor is not an accurate measure as to the degree of interference which may be found. In this instance all the female employees apparently worked under the two supervisors involved, Bea Bowman and Judy Johnson, with Bowman working on the day shift and Johnson on the night shift (R 133, 136). The fact that the female employees worked together in one area and that as a first-line foreman Bowman and Johnson were in close contact with their fellow female employees would seem to make their Union activities all the more influential. Without doubt had Aero Corporation commissioned these ladies to engage in the very activities they are shown to have participated in, in behalf of a rival union, it would have been found guilty of violating Section 8(a)(2) of the Act,[16] Interference with employee organizational activities is no less serious because the interfering supervisors were not acting upon specific instructions of an employer. The effect is equally objectionable whether at the Company's instance or not.

As a basis of this conclusion, the Court below seems to have accepted the Board's somewhat silly theory that to approve the Petitioner's arguments would give license to employers to encourage "marginal" supervisors to such deeds and later use such dirty work as defense to refusal to bargain charges. Since such conduct by Aero Corporation is suggested nowhere in the record, the obvious re-

16. *International Association of Machinists, Lodge 35 v. NLRB*, (1940) 311 U.S. 72; *NLRB v. Pallette Stone Corp.*, (C.A. 2, 1960) 283 F. 2d 641; *Hampton Merchants Association, et al.*, (1965) 151 NLRB 1307; *General Molds and Plastics Corporation*, (1958) 122 NLRB 182.

sponse to this doubtful proposition is this: that since the fact of supervisory interference in behalf of the Union is not hypothetical but on the record, to allow such known interference to go completely unchallenged will likely encourage unions to illegally recruit supervisors to interfere in employee organizing rights by going about coercing employees into signing union cards. In view of the facts, the above reasoning would seem to be a great deal more appropriate than the Board's and the Court below.

The testimony reflects the following improper activities on the part of supervisors Bowman and Johnson. Bea Bowman herself admitted being involved in organizing the Union at Aero by testifying that she had "something" to do with Union cards. She testified that Johnson wanted Union cards to distribute and inquired of her where such cards might be obtained. Later, Mrs. Bowman contacted one of the Union's chief organizers, Jessie Heard, and requested and obtained cards. Later, according to Bowman, Mrs. Johnson obtained cards from Bowman's purse and distributed the cards to other employees for signing. Mrs. Bowman further testified that Mrs. Johnson did not get all the cards signed at once, but the ones she did get signed were put back into Mrs. Bowman's purse and later returned to Jessie Heard (R 135, 136).

Judy Johnson offered testimony that she asked Bea Bowman for Union cards but at the time, Bowman had none. Johnson said that later she obtained a number of cards from Bowman. Johnson specifically admitted that she "got cards" she "had signed" from Bea Bowman's purse. Johnson admits she gave cards to employee Mildred Easterwood, but as other evidence discloses she also gave cards to other employees (R 177, 178). Easterwood testified that the only card she signed is the one offered in evidence, and, further, that she returned that card to Judy Johnson (R 122, 123), who was Easterwood's own supervisor (R 176, 177). Easter-

wood further testified that she was given several cards by Johnson, one for herself and one for another employee (R 122, 176, 177).

Witness Rachel Brown testified that she signed a Union card, as did her daughter, Rebecca Brown, and that these cards were given to Judy Johnson. This witness further indicated in her testimony that she was not just given one Union card, but was given a stack of cards by Johnson (R 39). Employee Inez Roberts testified that she signed only one card which was given to her by her supervisor, Johnson, and that she returned this card to Johnson (R 48).

One of the Union's chief organizers and the General Counsel's witness in chief, Jessie Heard, testified that Bea Bowman "thought" the Union was a good thing and had actively helped and assisted organizing the Union during February, 1962 (TR pp. 240-242 in Appendix "C" of this Petition)[17] and that Judy Johnson told him she had asked Bowman to help solicit Union cards from employees (TR p. 258 in Appendix "C" of this Petition). He also said that before the Union cards were in existence he had previously discussed the Union's organizing drive with Mrs. Bowman (TR pp. 246, 247 in Appendix "C" of this Petition). According to Heard, Supervisor Bowman collected some sixteen Union cards and gave them to him two or three days after the first Union meeting, and also according to this witness contrary to the testimony of both Johnson and Bowman and the Board's conclusion that neither Bowman nor Johnson signed cards, included in this batch of cards were cards for Johnson and Bowman[18] (TR pp. 243,

17. "TR" refers to the Board hearing transcript.

18. The Board accepted the Trial Examiner's conclusion that neither Johnson nor Bowman signed Union cards. The Examiner says he made his conclusions here from the testimony of Heard, Bowman, Johnson and Quatrini. He also concluded, erroneously, that the sixteen Union cards were "lost" on testimony of these same witnesses (JA 370-371).

244 in Appendix "C" of this Petition). His testimony further discloses that employee Betty Phillips signed a card in his presence which card was given to Bowman, then to him (TR p. 245 in Appendix "C" of this Petition). And in reference to Judy Johnson, he said that he gave Union cards to Johnson who "voluntarily wanted the cards so that she could get the girls to sign them" (TR p. 247 in Appendix "C" of this Petition).

The Petitioner contends that the activities of not only Johnson but also Bowman are not "limited" and could be more accurately described as substantial; and that the status of these supervisors, especially Bowman, is certainly not "unclear" as characterized by the Court. The evidence clearly discloses that the Union illegally used the Company's female supervisory personnel as a main tool in securing authorization cards from Aero's female employees. These two supervisors did not work alone but together as a team. The activities of one cannot be segregated from the activities of the other. Significantly, out of the Union cards counted as valid authorization by the Board on both April 8 and April 29, some twenty-two of those cards were from female employees (R 384-388).

At the beginning of the Board hearing, Jessie Heard claimed in his testimony and the General Counsel contended that the cards solicited by Bowman and Johnson were mysteriously lost in the mail, a device obviously designed by the General Counsel to neutralize the effect of Bowman's and Johnson's interference. The Trial Examiner in his decision accepted this explanation in spite of the fact that cards handled by Johnson and Bowman including those of Easterwood, Inez Roberts and Rebecca and Rachel Brown also mysteriously reappeared as evidence of the Union's "majority" status. While the Petitioner is aware of the

Board's and the Court's carefully pointing out that the Board did not rely on the Trial Examiner's findings, surely such obvious inconsistencies cast great doubt as to whether the evidence supporting these findings can truthfully be considered "substantial".

The Board in its decision has consistently held that interference by an employer's supervisors in employee organizational affairs is a serious matter. In a number of cases the Board has held such interference to be an important factor in determining the validity of a Union's card count.[19] In its decisions it has also indicated that it is not necessary that authorization cards be personally solicited, since the mere presence and encouragement by such individuals fatally impairs the cards' validity.[20] And in a number of other instances, the Board has found a union's authorization cards to be invalid and has dismissed representation petitions because of such interference.[21]

The Petitioner respectfully submits that the Court below erred in its findings as to the activities of the two supervisors. Substantial evidence considered on the record as a whole shows that the improper collective activities of Bowman and Johnson fatally tainted and voided the authorization cards of at least four female employees[22] and further, that such conduct is of such a substantial nature that the cards of the female employees cannot be considered as valid Union authorization to bargain.

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19. *Insular Chemical Corporation and Rubber Corporation of America*, (1960) 128 NLRB 93.

20. *The Metal Products Corp.*, (1957) 119 NLRB 659.

21. *Southeastern Newspapers, Inc.*, (1960) 129 NLRB 311; *Desilu Productions, Inc.*, (1953) 106 NLRB 179.

22. The cards of Mildred Easterwood, Inez Roberts, Rachel Brown and Rebecca Brown.

(6) Where the General Counsel has sworn affidavits in his possession bearing upon the execution of Union authorization cards and the fact of valid execution of these cards is to be decided not by the witness' own testimony, but by handwriting analysis, may the General Counsel on demand refuse to allow examination of such statement at the hearing.

In late January and early February, 1962, just prior to the Board hearing of this case, the General Counsel's investigator interviewed all available alleged Union card signers. They were interrogated through a form affidavit. Several of these affidavits were placed in evidence by the Trial Examiner (See TX Ex. 7, 9, 11 in Appendix "D" to Aero's Brief in the Court below). The record is replete with references to form affidavits and a large number of them were produced at the hearing where the intended card signers testified (R 43, 64b-65, 84, 85, 112, 118, 122-123, 137).

The affidavits requested the witness to state whether he had signed a Union card and to read from the authorization card the words "authorize UAW to represent me in collective bargaining". The affidavit then asked "What did you understand you did or what did you intend by signing this card?". As indicated by the affidavits, the employees responded both as to what was represented to them as to the card's purpose and use and their intention in executing the cards. In a number of instances when card execution was "proved" by expert testimony of handwriting analysis and counted as valid authorization, the General Counsel refused to make employees' affidavits[23] available at the hearing. The Trial Examiner refused to require production of these affidavits on demand of Petitioner's counsel (R 115-116).

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23. These persons are identified in the record as Kenneth Harris, Edgar Olivent, Robert Weadon, and Lloyd Fox.

Surely whether or not the alleged card signer actually takes the stand or not, he nevertheless is testifying through his signature and the language in the card as to the fact of Union authorization. This is the entire purpose of having the handwriting expert establish the authenticity of the card's signature. And similarly, is not the "testimony" contained in these affidavits as to whether they signed a card and what was told to them by the Union about the card's use just as material and important as what the cards themselves "say". But most important is the fact that these affidavits and the information they contained were not made available to Aero. The purpose of making affidavits available is to allow the opposing party to decide whether to use them in his defense. Furthermore, not only were these affidavits concerned with the execution of the cards, but also had to do directly with the credibility of the witness who was testifying, the handwriting expert.

Under the reasoning of this Court in *Jencks* v. *United States of America*, (1957) 353 US 657 and the Circuit Court in *NLRB* v. *Adhesive Products Corp.*, (C.A. 2, 1958) 258 F. 2d 403, Aero was entitled to examine the affidavits on two counts. It was entitled to know what the affidavits may have said as to the signing of union cards, which is what the handwriting expert's opinion testimony was about, and it was entitled to know the contents of the affidavits for its cross-examination of the handwriting expert and to determine if it should locate and subpoena the card signers and "cross-examine" them as to the cards' execution. In view of the introduction and acceptance of these cards as valid proof that some eleven[24] employees

24. These are the cards of John Anderson, James Blackburn, George Bullard, William Coarsey, Lloyd Fox, James R. Giles, Jimmy Griffin, Kenneth Harris, Ben Lindsey, Edgar Olivent, and Robert Weadon. The Anderson and Coarsey cards were counted as valid subsequent to April 29, 1962, only.

signed union cards, Aero was clearly entitled to inspect these affidavits to decide whether to use them or their contents in defense of the charges. But not only does the Petitioner contend the denial to be contrary to *Jencks* v. *United States of America, supra,* but further urges that the ruling here to amount to a denial of due process.[25] In view of the background of misrepresentations made to card signers by the Union as to the card's purpose and use and the known contents of the affidavits placed in the record, Aero had every right to the use of affidavits which contained information vital to its defense.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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25. *Consolidated Edison Co.* v. *NLRB,* (1938) 305 U.S. 197; *NLRB* v. *Burns,* (C.A. 8, 1953) 207 F. 2d 434.